

govern the issuance of licenses by auction be designed to minimize administrative and judicial delay.⁴⁶

For the Commission to accomplish with this objective, it will have to reinvent the licensing process. The new licensing process that it adopts for licensing PCS can then act as a prototype for other services as well. With this in mind, BellSouth proposes a streamlined PCS licensing process that will function as a model for other services.

In reinventing the licensing process for efficiency, the Commission should determine whether each step of the process is really necessary and whether it creates opportunities for delay that are not required by the Communications Act.⁴⁷ Accordingly, the streamlined process that BellSouth proposes is guided by the following principles: (1) Create no opportunities for delay or litigation beyond those required by statute; (2) Make all requirements clear and explicit; (3) Impose no requirements on applicants that are not necessary for compliance with the Communications Act or other statutes; (4) Every process used and every procedure followed must have a purpose related to a statutory objective. Accordingly, BellSouth proposes the following licensing process:

⁴⁶ 47 U.S.C. § 309(j)(3)(A).

⁴⁷ The Communications Act imposes surprisingly few constraints:

- (1) Applications must be in writing (§308(a)) and signed by the applicant (§ 308(b)).
- (2) The FCC must determine whether applications are acceptable for filing (§ 309(b)).
- (3) The FCC has discretion to determine the required content of applications and to set criteria for acceptability for filing (§§ 308(a), 309(j)(5)).
- (4) An auction is held if mutually exclusive applications are accepted (§ 309(j)(1)).
- (5) At least 30 days before it may grant an application, the FCC must give public notice of its acceptance for filing of the application and any major amendment (§ 309(b)).
- (6) Petitions to deny may be filed within 30 days of the public notice of acceptance for filing, and the applicant must be given an opportunity to reply (§ 309(d)(1)).
- (7) The FCC may require additional information at any time (§ 308(b)).
- (8) Before an application can be granted, the FCC must determine whether the applicant complies with foreign ownership limits (§ 310) and other qualification requirements (§ 308(b)), and whether grant would serve the public interest (§ 309(a)).
- (9) If there are substantial and material questions of fact as to the auction winner's qualifications, the Commission must use an expedited hearing process (§ 309(j)(5)); that may be a "paper" hearing and that evidence may be taken by officials other than administrative law judges (§ 309(i)(2)(A)-(B)).

1. Public notice shall be given of the opportunity to file applications and to participate in an auction. This notice will be published in the FCC's releases and in the Federal Register, as well as other publications.⁴⁸ To maximize informed participation by a variety of applicants, the notice will provide as much detail as possible regarding the licenses to be applied for. The public notice will be issued at least 30 days prior to the scheduled application filing date, with the auction scheduled as soon as possible thereafter (e.g., one week after the filing date).⁴⁹
2. The initial application form requires only limited information, such as name, address, telephone number, optional facsimile number, identification of the license being applied for, and certifications that the applicant is in compliance with the alien ownership restrictions, has the qualifications to be a licensee, is not disqualified from receiving FCC licenses for drug violations,⁵⁰ and is applying in good faith on its own behalf.⁵¹ This form would not exceed two pages, and no exhibits are required. No filing fee is required for PCS,⁵² and accordingly applications are filed with the Secretary of the FCC in Washington, D.C.
3. As soon as possible after the filing date, and at least several days before the scheduled auction, the Commission should issue a public notice listing all applicants for each license. The applications should be made available for public inspection to facilitate settlements.⁵³ Listing in the public notice should generally denote acceptability for filing,⁵⁴ but applications not meeting the criteria for acceptability should nevertheless be included in the listing. In such cases, the applicants should be notified immediately of any defects and be given an opportunity to submit a corrected application prior to the auction.⁵⁵

⁴⁸ To inform those businesses that Congress particularly sought to encourage to participate in the introduction of new services, *see* 47 U.S.C. § 309(j)(3)(B) and (4)(D), the Commission should publish these notices in a variety of specialized media.

⁴⁹ There is no statutory requirement that advance notice be given of an application filing date or auction date. To provide a variety of businesses an opportunity to participate, however, a reasonable amount of advance notice will be required.

⁵⁰ *See* Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853a; 47 C.F.R. § 1.2002.

⁵¹ This information is similar to that required prior to lottery in the Interactive Video and Data Service and parallels the information required in the transmittal sheets submitted with cellular lottery applications.

⁵² PCS is not included in the statutory table of application fees, 47 U.S.C. § 158. The Commission does not have authority to charge fees other than those listed in the statutory table.

⁵³ *See* 47 U.S.C. § 309(j)(6)(E).

⁵⁴ The auction statute permits the FCC to hold an auction only if "mutually exclusive applications are accepted for filing for any initial license." 47 U.S.C. § 309(j)(1). Furthermore, to participate in bidding, a bidder must "submit[] such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309(j)(5).

⁵⁵ Allowing resubmission or correction of defective applications will eliminate litigation that would inevitably ensue if applications are dismissed as unacceptable for filing without any opportunity for correction.
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4. Applicants may reach full settlements at any time before the scheduled auction for a particular license.⁵⁶ An auction will be cancelled only if all of the mutually exclusive applicants sign a notification that a settlement has been reached and file it with the Secretary of the FCC prior to the scheduled auction.⁵⁷
5. Mutually exclusive applicants wishing to bid in an auction must post a deposit meeting the requirements of the rules and file an executed bidder's certification form no later than the close of business one business day before the scheduled auction date.
6. The open auction is conducted in public by an auction house. The conduct of the auction shall be recorded in a manner that permits identification of each bid and bidder, to prevent fraud and permit detection of collusion. The winner and winning bid are announced immediately after each license is auctioned, and a public notice listing the results is issued on the same or following day.
7. The public notice listing the results shall establish dates for the winning bidder to submit an amendment containing additional materials,⁵⁸ for the filing of petitions to deny, and for the applicant to respond to any petitions. Appropriate periods might be 15 days after the public notice for the amendment, 30 additional days for petitions to deny, and a final 15 day response period.⁵⁹ No further pleadings should be provided for.

⁵⁵(...continued)

An applicant notified of a defect who does not correct the deficiency prior to the auction would not be permitted to bid.

⁵⁶ The auction statute maintains that the Commission must "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E).

⁵⁷ Auctions may be held only if there are mutually exclusive applications. 47 U.S.C. § 309(j)(1). The negotiation of a settlement among all eligible bidders eliminates this mutual exclusivity and allows award of a license without holding an auction. See 47 U.S.C. § 309(j)(6)(E).

⁵⁸ The Commission should not require the submission of detailed application materials prior to the auction, to avoid the cost of handling and storing a potentially large number of bulky applications. In services such as the Interactive Video and Data Service, applicants initially file an abbreviated form, and only the lottery winner files a detailed application. A similar approach should be followed for PCS. Thus, rules would be adopted setting forth the information that an auction winner must submit in its post-auction filing.

⁵⁹ Section 309(d)(1) requires the Commission to permit interested parties to file petitions to deny during a period of at least 30 days from the public notice of acceptance of any application or substantial amendment thereto. The post-auction amendment by the auction winner would presumably constitute a "substantial" amendment; thus, the Commission would have to allow at least 30 days after the amendment for filing petitions to deny. The applicant has a statutory right to reply to a petition to deny its application, see 47 U.S.C. § 309(d)(1), but the time allowed for this response is not set by statute. The Commission's rules generally allow 10 days for filing an opposition to a pleading, see 47 C.F.R. § 1.45(a), but other response times are allowed for opposing particular types of filings, see, e.g., 47 C.F.R. §§ 1.115(d) (15 days for opposing an application for review), 1.832(b)(2) (30 days for responding to petitions to deny cellular applications selected by lottery). A 15 day opportunity should provide an adequate opportunity to respond to petitions in most cases. There is no statutory requirement that the petitioner be allowed to reply to this filing. Accordingly,
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8. The staff will promptly review the winning bidder's application and inform the winner of any deficiencies. The winning bidder would be permitted to amend its application as needed to eliminate any deficiencies.⁶⁰
9. If no petition to deny is filed, the staff will complete its review of the application and issue a determination whether the application is grantable.⁶¹
10. If a petition to deny is timely filed, the applicant would file its response and may amend its application to address any objections.⁶²
11. The staff shall promptly review the application, amendments, petitions to deny, response, and any other information submitted and determine whether there are substantial and material questions of fact as to the applicant's qualifications, and if there are no such questions, issue an order determining whether the application is grantable.⁶³
12. If a determination is issued that an application is not grantable, the Commission should proceed to select a different applicant.⁶⁴

⁵⁹(...continued)

as in the rules for pleadings after cellular lotteries, the Commission should not generally provide an opportunity for further responsive pleadings. See 47 C.F.R. § 1.823(b)(2).

⁶⁰ Allowing correction of deficiencies would eliminate a major source of litigation and delay that has plagued cellular lotteries. The dismissal of lottery winners' applications for deficiencies virtually always results in petitions for reconsideration, applications for review, and court appeals. In many cases, new lotteries must be held, after considerable delay. Permitting the correction of deficiencies eliminate this litigation and delay entirely.

⁶¹ The Commission must determine that the applicant is qualified and that the public interest would be served by granting the application. 47 U.S.C. § 309(a), (j)(5). One week would appear to be an adequate time for analysis of an uncontested application and issuance of a determination of its grantability; depending on availability of staff resources, this might even be accomplished sooner.

⁶² Allowing the applicant to amend its application in response to the petition would remove a potential source of litigation and delay, as does allowing correction of deficiencies.

⁶³ 47 U.S.C. § 309(d)(2) requires the Commission to determine whether substantial and material questions of fact exist requiring resolution by hearing and, if it denies a petition, to state concisely its reasons for doing so. The statute does not require that the opinion setting forth the Commission's reasons for denying a petition be issued simultaneously with the order denying the petition, although this has been the Commission's practice in the past.

⁶⁴ The Commission should adopt rules establishing whether a new auction would be held, or instead the second-highest bid would be accepted. In either case, the Commission should move ahead with selection of a new winning bidder promptly upon disqualifying the original winning bidder; it should not delay action pending resolution of petitions for reconsideration, applications for review, or appeals.

13. If a determination is issued that an application is grantable, the applicant shall have 7 days in which to submit payment in satisfaction of its bid in the form of a lump sum or a down payment and installment note.⁶⁵

CONCLUSION

The Commission should promptly initiate a proceeding to implement the use of auctions for awarding PCS licenses. BellSouth submits that the public interest and the specific objectives set by Congress will be best served by use of open bidding for licenses in a sequential fashion, utilizing the procedures described above.

Respectfully submitted,

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⁶⁵ To prevent fraud and abuse, payment must precede issuance of any license. A one-week period for payment is comparable to the settlement period allowed for payment when securities are purchased through a broker.

APPENDIX A -- SELECTION OF AUCTION TYPE TO MAXIMIZE PRICE

The principal factors affecting a choice of auction type are: (1) whether the bidders are risk-neutral or risk-adverse with respect to winning the auction; (2) the degree to which the license has a unique and independent value to each bidder, or instead has an objective value common to all bidders, which each bidder attempts to assess; and (3) whether there are differences among the bidders that result in groups holding different ranges of potential values for the licenses.¹

In a baseline case where all bidders are risk-neutral, the good being auctioned has an independent private value to each bidder, and the bidders are symmetric (i.e., a single probability function describes the range of values for all bidders), all of the basic types of auction will, on average, yield the same sale price.² However, if any of the baseline assumptions are changed, one type of auction may be likely to generate more revenues than the other.

Specifically, if all bidders are risk-averse, rather than risk-neutral, a sealed-bid auction will yield a higher price than an open auction.³ If the license does not have an independent private value to each licensee, and instead has an objective value that all the bidders try to evaluate, the open auction is expected to yield a higher price.⁴ Furthermore, if there are two or more classes of bidders that have different valuation strategies, an open auction would have the same efficient result as if the bidders were symmetric, but a sealed-bid auction becomes unpredictable and can result in decreased revenues.⁵

¹ *Auctions and Bidding* at 704-06.

² *Auctions and Bidding* at 710. The baseline case also assumes that payment is a function of the bids alone, without royalties, preferences, or bidding incentives. The equivalence of the four models stands even if a reserve price is established by the seller. *Id.* at 714.

³ *Auctions and Bidding* at 719.

⁴ *Auctions and Bidding* at 722.

⁵ *Auctions and Bidding* at 714-15.

Risk attitude. The bidders will diverge with respect to their willingness to risk losing the auction. Many bidders will be risk-neutral -- willing to participate seriously in the bidding for a license, but not willing to come too close to their assessment of the value of the license. Other bidders may be risk-averse, because of their substantial investment in preparing for entry in a particular market, or their certainty that a particular license is essential to permit their existing business in a market to evolve.⁶

While a sealed-bid auction will yield a higher price than an open auction if *all* bidders are risk-averse, the same conclusion does not necessarily follow if only some bidders are risk-averse. A risk-averse bidder will bid closer to its valuation in a sealed-bid auction, but a risk-neutral bidder may nevertheless be the highest bidder if it places a higher value on the license. Thus, if bidders have varied attitudes toward the risk of losing the auction, the price in a sealed bid auction would tend to increase as a result only if the highest bidder is risk-averse.

An open auction, on the other hand, would give all bidders the opportunity to reassess their bidding strategies in light of the bidding behavior of others. This would permit a risk-averse bidder to bid even closer to its valuation or to reassess its valuation -- and raise its bid -- in light of the continued bidding by others.⁷ This would give the risk-averse bidder the opportunity to continue raising its bid when another party unexpectedly raises its bid. Given the risk-averse bidder's motivation to win the auction, there is a considerable likelihood that an open auction would result in a higher price than a closed-bid auction when there is such a "wild card" bidder. Thus, the fact that

⁶ For example, the licensee of an experimental system, a cable television operator that has begun investing in fiber optic facilities that can support the new radio service, or a telephone company that sees PCS as critical to the evolution of local telephone service, may be very unwilling to risk failing to win a particular license.

⁷ An "essential difference" between the open auction and the sealed-bid auction "is that the process of bidding in the [open] auction conveys information to the bidder." Thus, the bids in an open auction "have the effect of partially making public each bidder's private information about the item's true value." *Auctions and Bidding* at 722. If the bidders do not base their bids solely on the independent private value of the license to them, because the license has some objective value common to all of the bidders, then their bids will be influenced by others' assessments of that objective common value, as expressed in the bidding. *Id.* at 722-23.

only some bidders will be risk-averse in these services tends to favor an open auction over sealed bids, from the standpoint of revenue production.

Independent or common value. In these services, the Commission will give licensees the ability to develop new products and services, and use various technologies, so as to meet a range of evolving customer needs. As a result, the bidders will include companies with very different visions of how the service will evolve. These different ways of developing the service are highly interdependent, however, because the bidders will use the licenses to provide services to paying customers.

The spectrum has value to such bidders only because it can be used to generate income by providing services. The spectrum thus has an objective value common to all bidders, based on its commercial income-producing potential. The bidders' differing valuations of a given license, then, result from their varying assessments of that common value, and not from some unique private value it has independently for each bidder.

These licenses are classic examples of goods for which the common value model is applicable. Because of its commercial potential, a license will have the same objective value to all bidders, but "no one knows this true value. The bidders, perhaps having access to different information, have different guesses about how much the [license] is objectively worth."⁸ The open auction will yield a higher expected price than a sealed-bid auction in the case of a license with a value common to all bidders. This is because of the information conveyed by the open bidding process. The bidders are continually able to reassess the likely value of the spectrum during the bidding, based on the information about the license's value conveyed by the bidding behavior of others.⁹ Such reassessments are particularly likely to occur in bidding for a license in a new service such as PCS, where there are no existing benchmarks of value. The substantial uncertainty as to the value of such

⁸ *Auctions and Bidding* at 705.

⁹ *Auctions and Bidding* at 722.

licenses militates strongly in favor of open auctions, from the viewpoint of producing revenue and avoiding unjust enrichment.

Asymmetry of bidders. An open auction is also preferable because the bidders for these licenses will fall into several distinct classes with different cost structures for deploying the new services that these licenses will make possible. For example, some bidders will have other businesses that will provide them with advantages in developing the new services, such as transmitter site locations, manufacturing plants, or fiber optic distribution networks. As a result, these bidders have a higher range of valuations to place on a license than others without such cost advantages. There are thus (at least) two classes of bidders with different valuation ranges.

An open auction operates in the same manner whether or not the bidders are asymmetric with respect to their valuation ranges. The bids will ascend until the price reaches the second-highest valuation, without regard to the class that the bidders fall into. In a sealed-bid auction, however, the bidder with the highest valuation will not necessarily win, particularly if the valuation ranges of the two classes overlap.¹⁰ An open auction would eliminate the potential for the license being awarded for less than the second-highest valuation.¹¹

¹⁰ See *Auctions and Bidding* at 714-15. For example, a bidder from the lower-range class might, under these circumstances, outbid a bidder from the higher-range class even though the latter valued the license more highly.

¹¹ In the circumstances described in the preceding footnote, the higher-range bidder would raise the bidding until it reached the lower-range bidder's value.